IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1862

ADVOCATES FOR THE ARTS, et al.,
Petitioners
v.
MELDRIM THOMSON, JR.
GOVERNOR OF THE STATE OF
NEW HAMPSHIRE, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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In the Supreme Court of the United States
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No.

Advocates for the Arts, et al., Petitioners

v.

Meldrim Thomson, Jr.,
Governor of the State of New Hampshire, et al., Respondents

Petition for a Writ of Certiorari
To the United States Courts of Appeal for the First Circuit

The petitioners, Advocates For The Arts, Granite Publications Incorporated, Rosellen Brown, Douglas K. Morse, and Vera Vance respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on March 31, 1976.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinion of the United States District Court for the District of New Hampshire is reported at 397 F. Supp. 1048.

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on March 31, 1976. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

QUESTION PRESENTED

Whether, in revoking a grant of funds provided by The National Endowment For The Arts, on the basis of their personal prejudices against the use of certain language, the Governor and Executive Council of the State of New Hampshire abridged the First and Fourteenth Amendment rights of a literary magazine, its contributors and readers.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; . . . ."

The first section of the Fourteenth Amendment to the United States Constitution is as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The National Endowment for the Arts (hereinafter referred to as the "National Endowment") was created by Congress as part of the National Foundation on the Arts and Humanities. Pursuant to 20 U.S.C. §954 (g) the National Endowment carries out a program of grants in aid to various State

agencies which in turn administer the funds consistent with the purposes of the act.[1]

The New Hampshire agency which receives and administers National Endowment funds is the New Hampshire Commission on the Arts (hereinafter referred to as the "Commission"). In fiscal 1974, the Commission received One Hundred Fifty Thousand Dollars ($150,000.00) as a bloc grant under 20 U.S.C. §954 (g). The Commission receives applications for funds from various individuals, groups, or organizations seeking financial support for programs connected with the arts. The Commission determines whether certain financial and administrative requirements have been met, and then reviews the applications in order to ascertain whether the project is of sufficient artistic or literary merit to warrant a grant of National Endowment funds. If an application is approved, the Commission executes a contract with the applicant which contract is then forwarded to the Respondents, the Governor and Executive Council of the State of New Hampshire, so that the funds so awarded may be disbursed.[2]

Petitioner, Granite Publications, Inc., (hereinafter referred to as "Granite"), is a non-profit corporation which publishes, in Hanover, New Hampshire, a journal of poetry, fiction, translations and letters under the title *Granite*. *Granite* was founded in 1971, and rapidly became known as a magazine of high literary endeavor.

On July 29, 1972, *Granite* applied to the Commission for a grant of National Endowment funds. The Commission determined that the journal was of sufficient literary merit and

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[1] In the Declaration of Purpose, Congress stated, among other things: ". . . that the practice of art and the study of the humanities requires constant dedication and devotion and that, while no government can call a great artist or scholar into existence, *it is necessary and appropriate for the Federal Government to help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry, but also the material conditions facilitating the release of this creative talent;*" 20 U.S.C. §951 (5) (emphasis added)

[2] Funds awarded by the National Endowment are first placed in the State Treasury. In order for any of those funds to be withdrawn, a warrant must be issued from the Governor and the Executive Council authorizing the withdrawal. New Hampshire Revised Statutes Annotated 4:14.

made an award of Nine Hundred Fifty Dollars ($950.00). This grant was subsequently approved by the Respondents, the Governor and Executive Council. The National Endowment funds allowed *Granite* to maintain its standards of excellence and, indeed, to attract some of the best known poets in America.

The following year *Granite* again applied to the Commission for National Endowment Funds. Based upon its literary merits, the Commission again awarded funds to the journal. The contract which encompassed the award was approved and ratified by the Governor and the Executive Council at an Executive Council meeting on May 1, 1974. Shortly after the May 1st meeting had adjourned, the Respondents were shown one poem which had appeared in one back issue of *Granite*. Thereupon the meeting was reconvened and, based on one poem in one back issue, the award to *Granite* was revoked. The award was withdrawn by the Governor and Council solely because they thought it contained a poem which used off color language, or as the Governor characterized it, an "item of filth."[3] This action was taken without the benefit of any expert opinion as to the literary merits of the poem in question.

Subsequent to the revocation, the Governor wrote to the Commission and indicated that *Granite* would receive no further support from the Governor and Council because it had published "obscenities." As a direct result of the Respondents' action, *Granite* did not receive the National Endowment funds awarded by the Commission, and was forced to curtail and delay the publication of further issues.[4]

The Complaint in this case was filed in the United States District Court for the District of New Hampshire on April 15, 1975. The Petitioners are Advocates For The Arts, a non-profit organization created to promote the arts, Granite Publications, Inc., Rosellen Brown, an individual and a contributor to *Granite*, Douglas K. Morse, an individual and a member of Advocates, and Vera Vance, an individual member of Advocates who

[3]The poem is reprinted herein at p. 21 as an appendix to the decision of the Court of Appeals.

[4]This is an appeal from a motion to dismiss. All of the foregoing facts are based on the Complaint and affidavits, no Answer having been filed.

is both a contributor and subscriber to *Granite*. All individuals are residents of the State of New Hampshire. Advocates For The Arts sued on behalf of its members residing in New Hampshire.

The Complaint sought declaratory and injunctive relief and alleged that the action of the Governor and Council, in revoking the grant, constituted a violation of the First Amendment. Count II alleged that the same action constituted an unlawful impoundment of funds contrary to 20 U.S.C. §954 and New Hampshire Revised Statutes Annotated Chapter 19-A. The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. §1331, 28 U.S.C. §1343 (3) , and 42 U.S.C. §1983.

The Respondents filed a motion to dismiss and requested that the Court treat the motion as a motion for summary judgment. The District Court, in a decision reported at 397 F. Supp. 1048 (D.N.H. 1975), held that all plaintiffs had standing to sue and that jurisdiction was properly invoked under 28 U.S.C. §1331. It then dismissed Count I for failure to make out a valid First Amendment claim. The Court went on to dismiss Count II, holding that under the statutory scheme, the Governor and Council had the discretion to take the action complained of and that no unlawful impoundment had occurred.

Pursuant to 28 U.S.C. §1291 Petitioners filed an appeal to the United States Court of Appeals for the First Circuit. The appeal sought review of the First Amendment issue only. On March 31, 1976, the Court of Appeals issued its decision affirming the judgment of the District Court. The Court of Appeals held that jurisdiction was properly invoked under 28 U.S.C. §1343 (3) and 42 U.S.C. §1983 and did not consider whether jurisdiction was proper under 28 U.S.C. §1331. It held that Granite Publications, Inc., had standing and did not consider the standing of the other plaintiffs. The First Circuit rejected Petitioners' reliance on the prior restraint doctrine and held, in short, that the problem was incapable of a constitutional solution.

REASON FOR GRANTING THE WRIT

THIS CASE PRESENTS AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW WHICH HAS NOT BEEN SPECIFICALLY DETERMINED BY THIS COURT.

The underlying question which is presented by this case is the extent to which the First Amendment applies to decision making regarding public funding of the arts. Petitioners submit that how this question is answered will have far reaching consequences in a society which seeks to encourage literary and artistic expression through a system of public grants.

Public funding of the arts is widespread. The fact that Congress has authorized the National Endowment for the Arts alone, to provide a minimum of Two Hundred Thousand Dollars ($200,000.00) in grants-in-aid to each State which has an approved plan, [20 U.S.C. §954 (g)], illustrates that such funding is becoming an increasingly important source of support for creative talent. Accordingly, although this is a case of first impression, this Court's review of the decision below will have a significant impact on that ". . . climate encouraging freedom of thought, imagination, and inquiry . . ." which the grant-in-aid system seeks to foster. 20 U.S.C. §951 (5). "Freedom of thought, imagination, and inquiry" will be stifled and creativity chilled if writers who hope to receive National Endowment funds are deprived of First Amendment protection.

The decision to award an arts grant necessarily involves the exercise of judgment and an evaluation of competing applicants. But, as this court made clear in *Perry v. Sindermann,* 408 U.S. 593 (1972) ". . . even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely . . ." 408 U.S. at p. 597. The government may not act as a censor without procedural safeguards. *Carroll v. President and Commissioners of Princess Anne,* 393 U.S. 175 (1968).

In the instant case, the Governor and Executive Council of the State of New Hampshire revoked an award to a highly

respected literary journal. The literary merit of the magazine was not even considered. The sole reason for the Respondents' action was their personal prejudice against certain vernacular terms that were used in a poem. The Complaint alleges that the withdrawal of the National Endowment funds forced the magazine to delay and curtail further publication. In effect, the Governor and Council's action was tantamount to censorship of *Granite* magazine. It was a censorship which not only affected *Granite,* but indirectly affects all working artists in New Hampshire who are cognizant of the Respondents' viewpoints and who desire to apply for public funding of the arts. Each such artist must consider whether he should mold his thought and modes of expression to conform to the tastes of the Governor and the Executive Council, if he wishes to apply for National Endowment funds.

Withdrawal of the award to *Granite* was similar to the action which this Court struck down as a prior restraint in *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546 (1975). In *Southeastern Promotions,* a municipal Board reviewed applications of those seeking to use a municipal theatre in Chattanooga, Tennessee. As with the award of National Endowment funds, approval by the Board in *Southeastern Promotions* ". . . was not a matter of routine; instead, it involved the 'appraisal of facts, the exercise of judgment, and the formation of an opinion' by the board." 420 U.S. at p. 554. The First Circuit below, considered it ". . . implicit in the Court's disposition of the case [*Southeastern Promotions*] that the decision must not turn on subjective official preferences . . ." (Appendix, Note 3, p. 17).

The Court found the denial of a valuable economic benefit — the use of the municipal auditorium — because the Board, based on its subjective preferences, considered the play "Hair" to be obscene, constituted a prior restraint because procedural safeguards were lacking. Petitioners submit that denial of a valuable economic benefit — the award of National Endowment funds — based upon the Governor and Executive Council's own personal responses to certain language used in a poem, is equally violative of the First Amendment.

Petitioners do not suggest that this Court should establish

guidelines for arts administrators to follow. There may be many justifiable reasons for the rejection of a potential applicant. But, a balance must be struck between the difficulties of inquiring into each administrative decision and the preservation of First Amendment rights. When it is clear that a decision was made for the wrong reasons, this Court should not hesitate to apply the First Amendment. To do otherwise, as the Court of Appeals has done, would be to declare that anyone who is applying for public funding of the arts must first give up his First Amendment rights.

The Court of Appeals in essence, proceeded on the assumption that decisions regarding public fundings of the arts ". . . will be made according to the literary or artistic worth of competing applicants . . ." (Appendix p. 16). On that basis it was reluctant to involve the Courts in the day to day decision-making process. However, where an award, made on the basis of literary or artistic merit, is revoked for an improper reason (the Governor and Council's personal predilections), a judicial refusal to interfere amounts to the sanctioning of an indirect system of censorship. The Court below has allowed public officials to use their unbridled descretion in a manner wholly at odds with the First Amendment. If the First Circuit Court's decision is allowed to stand, it may sow the seeds for the subversion of the entire process of public support for the arts.

Unless this Court grants this Petition, there is a very real danger that, rather than facilitating and enlarging artistic expression, public funding of the arts may become a device for shaping and controlling both the content and mode of artistic expression in this country. This danger is just as real as that posed by the broadly worded licensing ordinances which this Court did not hesitate to strike down in *Shuttlesworth v. Birmingham,* 394 U.S. 147 (1969), and *Cox v. Louisiana,* 379 U.S. 536 (1965), or the informal censorship system in *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963).

Any method of selecting applicants for public funding of the arts which allows decisions to be made without First Amendment protections will necessarily chill the very expression and communication of ideas which the public funding seeks to

foster. The effect of the decision below is to put a subtle but enormous pressure on any New Hampshire author or poet who would like to apply for National Endowment funds. This pressure will inevitably lead to a tempering of modes of expression if writers know that the Governor and Council disapprove of the use of certain words, even though they might have used those words to create a certain literary effect or to emphasize the message they wish to convey. Moreover, if the Governor and Council can exercise unbridled discretion as to the awarding of grants, there is the danger that only those who are willing to express viewpoints with which the Governor and Executive Council are sympathetic, would even apply for grants. Any New Hampshire writer who desires to apply for National Endowment Funds would have to consider whether his message might offend the Respondents. Such an atmosphere runs directly counter to the First Amendment, not to mention the legislative purpose of the National Endowment legislation. The vesting of discretion which would permit decisions regarding public funding of the arts to be made under these conditions is tantamount to granting the Respondents a license to place conditions on grantees in order to insure that only those ideas and modes of expression approved by them would receive public funding. Such a result must produce a chilling effect upon the exercise of First Amendment rights.

> ". . . freedom of speech . . . is . . . protected against censorship or punishment . . . there is no room under our consitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups." [Citations omitted. *Cox v. Louisiana,* 379 U.S. 536, 552 (1965)].

Petitioners submit that the decision of the Court of Appeals is in direct conflict with the intent and spirit of the First Amendment. It lays the groundwork for a "standardization of ideas." Time and again this Court has not hesitated to review decisions which could have far-reaching implications for the exercise of First Amendment freedoms. The opinion of the United States Court of Appeals for the First Circuit is such a decision.

CONCLUSION

For the foregoing reasons a writ a certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

ADVOCATES FOR THE ARTS,
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INCORPORATED, ROSELLEN
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APPENDIX

United States Court of Appeals
For the First Circuit

No. 75-1346

ADVOCATES FOR THE ARTS, et al.,
Plaintiffs, Appellants,

v.

MELDRIM THOMSON, JR., etc., et al.,
Defendants, Appellees.

Appeal from the United States District Court
for the District of New Hampshire
[Hon. Hugh H. Bownes, *U.S. District Judge*]

[397 F. Supp. 1048]

Before Coffin, *Chief Judge*,
McEntee and Campbell, *Circuit Judges*.

Howard B. Myers with whom *Ingram and Myers, Howard M. Squadron, Harvey Horowitz,* and *Squadron, Gartenberg, Ellenoff & Pesent* were on brief, for appellants.

Edward A. Haffer, Assistant Attorney General, with whom *Warren B. Rudman,* Attorney General, was on brief, for appellees.

March 31, 1976

CAMPBELL, *Circuit Judge*. The question in this case is whether the first amendment permits the Governor and Council of New Hampshire to refuse a grant-in-aid to a literary magazine because they regard a poem appearing in a past issue of the magazine as an "item of filth." The district court, treating the defendants' motion to dismiss as a motion for summary judgment under Fed. R. Civ. P. 12 (b) and 56, found no first amendment violation. 397 F. Supp. 1048 (D.N.H. 1975). We agree.

In 1965 Congress established the National Foundation on the Arts and the Humanities, 20 U.S.C. §§ 951 *et seq.*, in order "to help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry but also the material conditions facilitating the release of this creative talent . . ." *Id.* §951 (5). Within this foundation Congress established a National Endowment for the Arts with responsibility for awarding grants-in-aid, both directly to those groups and individuals whose artistic endeavors "have substantial artistic and cultural significance," *id.* §954 (c) (1), or are otherwise worthy of public support, *id.* §954 (c) (2)- (5) , and indirectly through state agencies established to serve the same purposes, *id.* §954 (g).

Responding to the federal legislation, the New Hampshire legislature established the New Hampshire Commission on the Arts (the Commission) to administer the grant program in New Hampshire. N.H. Rev. Stats. Ann. ch. 19-A. The legislature declared that "all activities undertaken by the state in carrying out [the program] shall be directed toward encouraging and assisting rather than in any way limiting the freedom of artistic expression that is essential for the well-being of the arts." *Id.* ch. 19-A:1. At first the legislature made no provision for executive review of the Commission's funding decisions, but under general provisions of the New Hampshire Constitution and laws calling for approval of treasury disbursements and department expenditures, N.H. Const., pt. 2, art. 56; N.H. Rev. Stats. Ann. ch. 4:15, the practice evolved that Commission grants of over $500.00 were submitted to the Governor and Council for their approval before becoming final. On July 5, 1975, while this litigation was before the district court, the legislature specifically provided for such approval by amendment to chapter 19-A. *Id.* ch. 19-A:6 (VI) (Supp. 1975) .

Granite is a journal of poetry, fiction, translations and letters that was first published in the spring of 1971. The first three issues, appearing in 1971-1972, were privately funded. An enlarged fourth issue, entitled *Northern Lights,* was supported by a grant-in-aid voted by the Commission and approved by the Governor and Council in mid-1972. The present controversy arose when *Granite's* publishers applied for a second grant in October 1973. On March 4, 1974, the Commission voted to

award a grant of $750.00. The Governor and Council at first determined to approve this grant, at a meeting on May 1, 1974. After the meeting was adjourned, however, the Governor and members of the Council were shown a poem in the *Northern Lights* issue of *Granite* entitled "Castrating the Cat."[1] They then reconvened the meeting and reversed their decision. At the time the Governor characterized the poem as "an item of filth," and in a letter notifying the Commission of the decision not to approve the *Granite* grant-in-aid explained that the magazine had published "obscenities."[2]

The complaint in this suit was filed on April 15, 1975. The plaintiffs are Granite Publications, the nonprofit corporation that publishes *Granite;* Advocates for the Arts, a national organization concerned with promotion of the arts, with members in New Hampshire; an individual member of Advocates of [sic] the Arts who resides in New Hampshire; and two individuals whose work appeared in the *Northern Lights* issue of *Granite,* one of whom is also a subscriber to the magazine. The complaint alleged that the Governor and Council, in disapproving the $750.00 grant-in-aid on the basis of their own "personal adverse reaction" to a single poem had violated the first and fourteenth amendments of the Constitution, as well as the federal and state statutes authorizing the grants program, 20 U.S.C. §954; N.H. Rev. Stats, Ann. ch. 19-A. Under 42 U.S.C. §1983 the plaintiffs sought declaratory and injunctive relief.

The district court found that federal jurisdiction was proper under 28 U.S.C. §1331 and that all of the plaintiffs had standing to sue. 397 F.2d 1048, 1049-50. On the merits the court sought to identify exactly what governmental conduct had aggrieved the plaintiffs. It considered that "[t]he only action taken by the defendants is their refusal to sanction the grant because, in their judgment, they do not believe the magazine worthy of State support." *Id.* at 1052. Regarding such a "value

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[1] *See* Appendix *infra.*

[2] Defendants do not contend, despite this characterization, that either the poem or any prior issue of *Granite* is obscene in the constitutional sense.

judgment as to . . . literary worth" as "intrinsic to the benefit being sought," the court could find no first amendment violation. *Id.* at 1052-53. Similarly, the court held that nothing in 20 U.S.C. §954 prevented state executive review of the funding decisions of a state agency established under that provision, and that such review was not only permitted but required by New Hampshire law. *Id.* at 1053-54.

In this appeal the plaintiffs have chosen not to pursue their statutory claims and ask us only to review that part of the district court's decision holding that their complaint alleged no first amendment violation.

There is no question that this case is properly before us. The plaintiffs' claim that the defendants' reversal of the grant awarded to *Granite* by the Commission stifled free expression raises a substantial federal question for which jurisdiction is plainly afforded by 28 U.S.C. §1343 (3) and 42 U.S.C. §1983. *Cf. Hagans* v. *Lavine,* 415 U.S. 528, 534-38 (1974). Moreover, the claim that as a result of the defendants' action *Granite* was forced to curtail and delay further publishing endeavors was enough to demonstrate that at least the publisher, Granite Publications, had a " 'personal stake in the outcome' such as to 'assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' " *O'Shea* v. *Littleton,* 414 U.S. 488, 494 (1974), *quoting Baker* v. *Carr,* 369 U.S. 186, 204 (1962). That Granite Publications is a corporation has no bearing on its standing to assert violations of the first and fourteenth amendments under 42 U.S.C. §1983. *See Grosjean* v. *American Press Co.,* 297 U.S. 233, 244 (1936) . Since we thus find a justiciable controversy between Granite Publications and the defendants under 28 U.S.C. §1343 (3) and 42 U.S.C. §1983, we find it unnecessary to consider either whether there is jurisdiction under 28 U.S.C. §1331, with its "amount in controversy" requirement, or whether any of the other plaintiffs besides the publisher have standing. *Cf. Doe* v. *Bolton,* 410 U.S. 179, 189 (1973).

Nor is there any question that if defendants violated the first amendment, federal injunctive relief would be appropriate.

The defendants have advanced no administrative remedy that must be exhausted before plaintiffs can assert their first amendment claim in federal court. If refusal of aid to *Granite* restrained freedom of speech, it would be no answer that *Granite* could seek funds directly from the National Endowment for the Arts under 20 U.S.C. §954 (c), *cf Southeastern Promotions, Ltd.* v. *Conrad,* 420 U.S. 546, 556 (1975), or that it could ask the National Endowment to cut off further funding of the New Hampshire Commission under 20 U.S.C. §954 (h), even assuming that that provision were applicable to the alleged violation, *cf.* Van Alstyne, *The First Amendment and the Suppression of Warmongering Propaganda in the United States: Comments and Footnotes,* 31 Law and Contemp. Prob. 530, 535 (1966) ("[T]he remedy of silence is generally not the way of the first amendment."). Nor are the plaintiffs barred from equitable relief by any adequate remedy at law. If the decisional process leading to denial of funds to *Granite* violated the first amendment, as plaintiffs allege, appropriate relief would include an injunction ensuring that the violation does not recur, whether or not *Granite* showed itself to be threatened by recurring violations. *See* Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court,* 71 Yale L.J. 599 (1962).

We turn, then, to the merits of the plaintiffs' first amendment claim. We do not, of course, understand plaintiffs to suggest that public funding of the arts is unconstitutional. Such a broadside attack would be undercut by the Supreme Court's interpretation of the first amendment in *Buckley* v. *Valeo,* 44 U.S.L.W. 4127, 4154-55 (U.S. Jan. 30, 1976). There the Court held that the public financing of political campaigns "furthers, not abridges, pertinent First Amendment values. . . ." *Id.* at 4154. The plaintiffs' claim is rather that a decision not to fund a particular arts project such as *Granite* based on nothing more than personal preferences constitutes a prior restraint of free expression. While they would not, apparently, subject public funding decisions to the full panoply of procedural safeguards applicable to official actions regulating expression in public places, *see, e.g., Southeastern Promotions, supra,* they urge that "narrow standards and guidelines" are constitutionally required to ensure that funding decisions be based on "literary or artistic

merit" rather than on the decision maker's "prejudices or his disagreement with what is being said . . . ." While this argument has some attraction, we find it ultimately unpersuasive.

The plaintiffs' reliance on the prior restraint doctrine is, in our view, mistaken. The premise of that doctrine is that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content[,]" *Police Department of Chicago* v. *Mosley,* 408 U.S. 92, 95 (1972), at least where the expression so restricted is protected "speech" within the first amendment, *cf. Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 571-72 (1942). It is to assure adherence to this principle that courts have required discretionary official action regulating expression to be accompanied by "rigorous procedural safeguards," *Southeastern Promotions, supra,* at 561, including prompt judicial review, *id.* at 560; *Freedman* v. *Maryland,* 380 U.S. 51, 58-59 (1965). But public funding of the arts seeks "not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge" artistic expression. *Buckley* v. *Valeo, supra,* at 4154. A disappointed grant applicant cannot complain that his work has been suppressed, but only that another's has been promoted in its stead. The decision to withhold support is unavoidably based in some part on the "subject matter" or "content" of expression, for the very assumption of public funding of the arts is that decisions will be made according to the literary or artistic worth of competing applicants. Given this focus on the comparative merit of literary and artistic works equally entitled to first amendment protection as "speech", courts have no particular institutional competence warranting case-by-case participation in the allocation of funds. *See Presidents Council* v. *Community School Board,* 457 F.2d 289 (2d Cir.), *cert. denied,* 409 U.S. 998 (1972).

There is, to be sure, a close resemblance between a governmental program directly subsidizing artistic projects and productions, and a governmental plan to construct and maintain an auditorium with public funds and to schedule dramatic and other artistic performances therein. And the Supreme Court has held that a municipal decision refusing to schedule a particular production in its auditorium on grounds of obscenity was a prior restraint of expression subject to the traditional procedural safeguards. *Southeastern Productions, supra.*[3] But we think there are significant differences between the two cases. First, the Court in *Southeastern* chose to view a public auditorium "as if it were the same as a city park or street . . ." *Id.* at 570 (Rehnquist, J., dissenting). Such an approach finds justification in the tradition of freedom from government interference with expression in public places in our society. *See, e.g., Shuttlesworth* v. *City of Birmingham,* 394 U.S. 147 (1969). But there is no similar tradition of absolute neutrality in public subsidization of activities involving speech. As the Supreme Court has observed. "Our statute books are replete with laws providing financial assistance to the exercise of free speech, such as aid to public broadcasting and other forms of educational media, 47 U.S.C. §§390-399, and preferential postal rates and antitrust exemptions for newspapers, 39 CFR §132.2 (1975); 15 U.S.C. §§1801-1804." *Buckley* v. *Valeo, supra,* at 4155 n.127.[4]

Second, while it may be feasible to allocate space in an auditorium without consideration of the expressive content of competing applicants' productions, such neutrality in a program for public funding of the arts is inconceivable. The purpose of such a program is to promote "art", the very definition of which requires an exercise of judgment from case to case. Moreover, money is a more flexible instrument than a public building: an applicant may receive varying amounts depending upon his needs and the promise of his work; similarly, the quantity of available funds may vary. Solutions that may work for an auditorium, such as scheduling on a fist-come-first-served basis or upon a prescribed showing of likely box-office success (if that is

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[3] Although the Court failed to confront squarely the problem of how a municipality is to resolve irreconcilable conflicts between multiple applications for use of the same facility at the same time, we think it implicit in the Court's disposition of the case that the decision must not turn on subjective official preferences. The opinion leaves it unclear, however, whether either of the Chattanooga facilities to which "Hair" was denied access went vacant during the period "Hair" applied for.

[4] We take notice, in addition, of the myriad federal grant programs for scientific and scholarly research. *E.g.,* 20 U.S.C. §§461-65 (National Defense Fellowships); *id.* §§134 *et seq.* (graduate programs — grants and fellowships); 42 U.S.C. §§1861 *et seq.* (National Science Foundation).

a solution),[8] are simply not available to a program for funding the arts. If such a program is to fulfill its purpose, the exercise of editorial judgment by those administering it is inescapable.

Plaintiffs contend nonetheless that while some consideration of content may be necessary, particular decisions should be required to follow "narrow standards and guidelines" that will insulate the result from the prejudices of the decision-maker. *See Shuttlesworth* v. *City of Birmingham, supra,* at 150-51. Presumably these standards and guidelines would elaborate the statutory standard of artistic and cultural significance, although just how they would further refine that standard is unclear. But however the standards are phrased, we think it would be unwise to require an objective measure of artistic merit as a matter of constitutional law. The Supreme Court has said that "[e]ach medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems [,]" *Southeastern Promotions, supra,* at 557, and it might be added that each form of governmental involvement in free expression must be similarly assessed. Attitudes toward art change, and even at one time, "it is . . . often true that one man's vulgarity is another's lyric. . . . " *Cohen* v. *California,* 403 U.S. 15, 25 (1971). In the absence of ascertainable principles by which to define artistic merit, we see no reason to demand that official discretion in this area be hedged by "narrow, objective and definite standards", *Shuttlesworth* v. *City of Birmingham, supra,* at 151. This is not to say that the standard of artistic merit is not an important goal, *see Accuracy in Media, Inc.* v. *FCC,* 521 F.2d 288, 297 (D.C. Cir. 1975), *petition for cert. filed,* 44 U.S.L.W. 3441 (U.S. Feb. 3, 1976) (No. 75-977) (viewing as "hortatory" the requirement of "strict adherence to objectivity and balance" in public broadcasting), but only that it and guidelines elaborating it do not lend themselves to translation into first amendment standards.

What is perhaps most troubling about this case is not that

[8]Compare the Federal Communications Commission's practice of allocating the public airwaves to broadcasters according, in part, to their success in meeting the needs and interests of the viewing or listening public as measured in public surveys, *see Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants,* 22 F.C.C. 2d 424, 426 (1970); *Policy Statement on Comparative Broadcast Hearings,* 1 F.C.C. 2d 393, 397 (1965).

Granite should be denied public support, but that the denial should be based on a reading of just one poem in a back issue, without consideration of the overall quality of the publication either alone or as compared to competing grant applicants. But we doubt that this problem has a constitutional solution. *Granite's* claim of arbitrary treatment at the hands of the Governor and Council is essentially a claim of denial of due process. Yet in the absence of any right to public support of private expression, it seems unlikely that *Granite* has a sufficient "liberty" or "property" interest in a favorable decision to be able to claim a right to procedural regularity under the fourteenth amendment. *See e.g., Goss* v. *Lopez,* 419 U.S. 565, 572-76 (1975), *cf. Morrisey* v. *Brewer,* 408 U.S. 471, 481 (1972).[9] And even if this hurdle were surmountable, it is difficult to say what process would be appropriate in this context. Given the ultimate necessity of subjective judgment, we doubt that the advantages of a hearing or statement of reasons would justify the cost, or that an explicit finding of insufficient artistic merit would have any more than cosmetic significance. In short, if the consideration *Granite* received was inadequate, it must look elsewhere than to the Constitution for relief.[7]

[9]There is no claim that the initial decision by the Governor and Council approving the $750 grant gave the publisher a vested interest in that amount. And in light of the established practice of executive review of grants exceeding $500, plaintiffs cannot assert any property entitlement arising directly from the Commission's unreviewed decision. *Cf. Perry* v. *Sindermann,* 408 U.S. 593, 602-03 (1972).

[7]That the Governor and Council should reverse the Commission does not in itself seem to us to raise a constitutional issue. While it may be argued that such a selective veto embodies the evils of governmental interference with expression without the justification of a necessary editorial function, *see* Canby, *The First Amendment and the State as Editor: Implications for Public Broadcasting,* 52 Texas L. Rev. 1123, 1134 (1973), we see little advantage to first amendment values in demanding that a single governmental agency have absolute and unreviewable discretion in allocating funds. It is ultimately the prerogative of elected officials to decide when and how to spend the tax dollar, and those administering grant programs cannot ignore the importance of continued legislative and executive confidence in their judgment. *Cf.* Jaffe, *The Illusion of the Ideal Administration,* 86 Harv. L. Rev. 1183 (1973). There may, of course, be good reason to leave the decision to an agency whose members are familiar

A claim of discrimination would be another matter. The real danger in the injection of Government money into the marketplace of ideas is that the market will be distorted by the promotion of certain messages but not others. To some extent this danger is tolerable because counterbalanced by the hope that public funds will broaden the range of ideas expressed. *See Buckley* v. *Valeo, supra.* But if the danger of distortion were to be evidenced by a pattern of discrimination impinging on the basic first amendment right to free and full debate on matters of public interest, *see New York Times Co.* v. *Sullivan,* 376 U.S. 254, 270 (1964), a constitutional remedy would surely be appropriate.* On where to draw the line, reasonable minds may differ. But in our view the refusal here to promote a magazine on the ground that it has published a poem entitled "Castrating the Cat", which contains language and imagery that some may find offensive, falls short of the kind of discrimination that justifies judicial intervention in the name of the Constitution. *Cf. Close* v. *Lederle,* 424 F.2d 988 (1st Cir.), *cert, denied,* 400 U.S. 903 (1970).

Affirmed.

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with the arts and relatively removed from political pressures. Yet there is also something to be said for having decisions made in the open, where they can be subjected to public scrutiny and debate, rather than "behind a screen of informality and partial concealment that seriously curtails opportunity for public appraisal and increases the chances of discrimination and other abuse. . . ." Emerson, *The Doctrine of Prior Restraint,* 20 Law & Contemp. Prob. 648, 658 (1955). The question is not, in any case, "so free from doubt that courts should impose an inflexible response as a matter of constitutional law. . . ." *Public Research Interest Group* v. *FCC,* 522 F.2d 1060, 1067 (1st Cir. 1975).

Whether Congress or the New Hampshire legislature contemplated or authorized the power of review that was exercised here is another matter. The district court ruled that there was no statutory violation, 397 F. Supp. at 1053-54, and as this ruling is not challenged here, we have no occasion to pass on it.

*We agree with the district court that distribution of arts grants on the basis of such extrinsic considerations as the applicants' political views, associations, or activities would violate the equal protection clause, if not the first amendment, by penalizing the exercise of those freedoms. 397 F. Supp. at 1052; *see Perry v. Sindermann,* 408 U.S. 593, 597 (1972), and cases cited therein.

Michael McMahon

CASTRATING THE CAT

— It is better to marry than to burn —
St. Paul

you may keep both balls preserved in a jar
on the mantle piece

he will be tamer more loving
to his keepers

he will not stray after cat cunt
and his urine will not smell
should he spray the mattress

— a simple swipe of scalpel
along the scrotum
and it is done —

do not let the image of your own hulk
drawn down a bannister of razor blades
finger the inside of your sac

think of him as a tenor in the choir

— and it is done
the nurse washes her hands of him
yes she smiles we clipped his wings —

as above the errors flesh is heir to
like St. Simeon on his desert pole
unwashed in rags
who picked up each worm that fell
from his arm bid it eat and put it back

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1862

ADVOCATES FOR THE ARTS, et al.,
Petitioners
v.
MELDRIM THOMSON, JR.
GOVERNOR OF THE STATE OF
NEW HAMPSHIRE, et al.,
Respondents

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW HAMPSHIRE

Advocates for the Arts; Granite Publications Incorporated; Rosellen Brown; Douglas K. Morse; and Vera Vance.

v.

Meldrim Thomson, Jr., Governor of the State of New Hampshire; James Hayes, Executive Councilor of the State of New Hampshire; Lyle Hersom, Executive Councilor of the State of New Hampshire; Bernard Streeter, Executive Councilor of the State of New Hampshire; Leon Yeaton, Executive Councilor of the State of New Hampshire; and Louis D'Allesandro, Executive Councilor of the State of New Hampshire.

Civil Action No. 75-97

MEMORANDUM OPINION

Plaintiffs bring suit to enjoin the Governor and Executive Council of the State of New Hampshire from allegedly interfering with and denying them their rights secured by the First Amendment to the United States Constitution. Jurisdiction is pursuant to 28 U.S.C. § 1331.

Plaintiffs are: Advocates for the Arts (Advocates), a nonprofit organization concerned with the promotion of the arts; Granite Publications, Inc., a nonprofit corporation which is the publisher of Granite Magazine; Rosellen Brown, a writer whose works have appeared in Granite Magazine; Douglas K. Morse, a teacher and member of Advocates for the Arts; and Vera Vance, a contributor to Granite Magazine and a member of Advocates for the Arts.

Defendants move that, with the exception of Granite, the other named plaintiffs lack standing to sue due to their inability to allege a judicially cognizable injury.

The First Amendment protects not only the right to speak, but also the right to hear and receive information. *Stanley* v. *Georgia,* 394 U.S. 557 (1969); *Griswold* v. *Connecticut,* 381 U.S. 479 (1965); *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965).

Plaintiffs have not proceeded pursuant to the Administrative Procedure Act, 5 U.S.C. § 702. Accordingly, they must establish that they have a "personal stake in the outcome of the controversy. . . ." *Baker* v. *Carr,* 369 U.S. 186, 204 (1962); *Sierra Club* v. *Morton,* 405 U.S. 727, 732 (1972).

Plaintiffs Brown and Vance allege that, as a consequence of defendants' action, they have been denied the right to publish their works in Granite Magazine. Plaintiff Granite alleges that, as a result of defendants' action, it was forced to curtail publication and distribution and that the restraint on publication has affected the rights of others to read and receive the magazine.

Plaintiffs Vance and Brown have a constitutional right to publish their works without any impermissible governmental interference and an allegation that the defendants have deprived them of their right to freely publish gives them a direct stake in the controversy and, therefore, standing to sue.

Plaintiffs Advocates and Morse stand on different footing. Morse has not alleged that he either writes for Granite or that he reads it. He attempts to assert the requisite degree of interest by being a member of Advocates. Plaintiff Advocates, on the other hand, has failed to assert that any of its members read Granite or subscribe to its publication; its sole allegation of harm is that Ms. Vance, who is a contributor to the magazine, is also a member of its organization.

The Supreme Court has held that even where an organization has had a long and involved "historical commitment" to the "public interest," this factor, standing alone, is insufficient to establish the requisite degree of harm. *Sierra Club* v. *Morton, supra.* The Court held that, although "an organization whose members are injured may represent those members in a proceeding for judicial review," it is essential for the organization to allege that it or its members are being adversely affected

by the defendants' actions. *Id.* at 735 and 739. *See also Warth* v. *Seldin,* U.S. ,43 L. W. 4906 (June 25, 1975); *Ex Parte Levitt,* 302 U.S. 633 (1937); *Fairchild* v. *Hughes,* 258 U.S. 126 (1922).

Because this suit involves First Amendment freedoms, the standing to sue requirement should not be rigidly enforced. *Smith* v. *Goguen,* 415 U.S. 566 (1974); *Coates* v. *City of Cincinnati,* 402 U.S. 611 (1971). *See generally,* Sedler, Standing to Assert Constitutional Jus Tertii in the Supreme Court, 71 Yale L. J. 599 (1962). Therefore, the interesting question of whether Ms. Vance's status provides Advocates with a sufficient interest in the suit, thereby enabling it to circumvent the holding in *Sierra Club,* need not be decided. I find that, liberally construing the complaint, all parties have standing to maintain this action and I will treat the plaintiffs as one for purposes of this opinion.

FACTS

The facts of this case are not in dispute. Granite Magazine is a journal of poetry, fiction, and other literary writings. In order to sustain itself during inflationary times, Granite applied to the New Hampshire Commission on the Arts (Commission) for federal grant-in-aid assistance. On July 29, 1972, the Commission determined that Granite merited financial support and voted it a grant of $950. This award was approved by the Governor and Council and payment was subsequently made to Granite.

On October 11, 1973, Granite, still in need of funds, applied to the Commission for a second grant totalling $1,000. The Commission, once again, found that Granite deserved its support and made an award of $750. On March 4, 1974, a contract of obligation was signed between the Commission and Granite and forwarded to the Governor and Council.

On May 1, 1974, the Governor and Council held a meeting at which the Granite contract was approved. Shortly after the meeting had adjourned, the defendants were shown a poem, entitled "Castrating the Cat," which had appeared in a previous Granite issue. A reading of the poem convinced the de-

fendants that Granite was not worthy of State assistance. The Council meeting was, therefore, reconvened and Granite's contract of entitlement was revoked. Granite has not received any portion of the second $750 grant.

Plaintiffs allege that the defendants' revocation of the grant contract impermissibly interferes with their First Amendment freedoms and that it was an abuse of governmental power, rising to censorship, for the defendants to refuse to honor the Commission's recommendation.

Although plaintiffs forcibly argue that First Amendment considerations control this case, I take a more pedestrian view and rule that it involves a question of statutory interpretation.

The issue is whether the Governor and Council have the power and authority to refuse to approve an art grant, which has been sanctioned by the Commission, solely because they believe the publication not to be artistically or culturally meritorious. I find that they do and defendants' motion to dismiss is granted.

THE GRANT SYSTEM

Congress, in 1965, recognizing the reality of the allegorical starving artist, established a National Foundation of the Arts and the Humanities. 20 U.S.C. § 951 *et seq*. In its declaration of purpose, Congress proposed that:

> while no government can call a great artist or scholar into existence, it is necessary and appropriate for the Federal Government to help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry but also the material conditions facilitating the release of this creative talent. 20 U.S.C. § 951 (5).

In order to effectuate the administration of the Act, Congress established the National Endowment for the Arts (NEA). 20 U.S.C. § 954. In NEA was vested the statutory responsibility for carrying out a program of grants-in-aid to the various states. 20 U.S.C. § 954 (g) (2).

In order to effectuate its mandate, NEA awards bloc grants to responsible state art agencies which, in turn, administer these funds to meritorious individuals or groups within the state, in accordance with the terms and goals of the Act. Pursuant to the federal statutory scheme, the New Hampshire Legislature established the New Hampshire Commission on the Arts. NH RSA 19-A:1 *et seq*. The federal bloc grants are made payable to the Commission where they are then deposited in the State treasury until disbursement. In order to be released from the State treasury, the Governor must issue a warrant authorizing disbursement. NH RSA 4:15.

Applications for section 954 (g) funds are first made to the Commission. It is the Commission's statutory responsibility to determine which of the many applicants are entitled to financial support. In order to receive the Commission's support, it must be found that the project has "substantial artistic and cultural significance, giving emphasis to American creativity." Once the Commission finds a project to be artistically meritorious, it is empowered to execute a contract or memorandum of agreement with the successful applicant. NH RSA 19-A:6. This contract of agreement is then forwarded to the Governor and Council where it must receive final approval so that a warrant can issue to the State treasury authorizing the release of the earmarked funds. The question is whether the Governor and Council may overrule the Commission and determine that a publication does not have significant artistic or cultural merit.

THE LAW

First Amendment

This appears to be a case of first impression.

Plaintiffs' counsel admitted at the hearing that in the area of "art" subsidation, some administrative body must be given ample discretionary powers. Indeed, counsel admitted that, if the Commission had denied plaintiffs' application on the ground that Granite Magazine contained obscene matter, this action would not raise any constitutional questions.

Neither the state nor the federal government may burden a public grant or benefit with conditions "whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms." *Sherbert* v. *Verner,* 374 U.S. 398, 405 (1963). *See also Perry* v. *Sindermann,* 408 U.S. 593, 597 (1972).

The danger that the Government may, through the administration of social benefits, regulate freedom of expression and thought is one of critical significance in our society and deserves close judicial scrutiny. *See Emerson,* The System of Freedom of Expression at 192-204 (1970). To vest unbridled discretion in any governmental office is an anathema to our political and social system which is founded on the concept of checks and balances. I must recognize that Governors, and even Presidents, do not always adhere to the rule of law. *Train* v. *City of New York,* 420 U.S. 35 (1975); *Opinion of the Justices,* 113 N.H. 141 (1973).

But this case is *sui generis.* The administration of the grants-in-aid program, by its very nature, necessitates an administrative finding that the project has "substantial artistic and cultural significance." 20 U.S.C. § 954 (c) (1). The determination whether Granite is entitled to the benefit can only be made by examining the contents of its publication and a subsequent value judgment as to its literary worth. This determination is intrinsic to the benefit being sought. And, while it is true that Granite is being denied the grant because of its content, this fact, standing alone, does not create an abridgement of the First Amendment. If plaintiffs had alleged that the defendants had denied the grant because they had signed their names to a peace petition or had supported the boycott of Gallo wine, then a palpable First Amendment claim would be made. The essential distinction is that the activity engaged in is extrinsic to the benefit being sought and has no reasonable relation to whether the applicant is entitled to its award. *Perry, supra,* 408 U.S. at 597. *See also Joyner* v. *Whiting,* 477 F.2d 456 (4th Cir. 1973); *Brooks* v. *Auburn University,* 412 F.2d 1171 (5th Cir. 1969).

There has been no allegation that the defendants have prevented plaintiffs from publishing Granite with their own private funds; nor has there been any allegation that the New Hampshire Attorney General, or his agents, have threatened plaintiffs

with criminal prosecution. NH RSA 650:2 (Supp. 1973). The only action taken by the defendants is their refusal to sanction the grant because, in their judgment, they do not believe the magazine worthy of State support.

The thrust of plaintiffs' position is that once the Commission has determined the merits of the grant, the Governor and Council have neither the right nor the authority to reverse the decision and veto the grant. In essence, they want the Governor and Council to give rubber stamp approval to all determinations made by the Commission.

Based on the foregoing, I find that this suit does not involve any First Amendment claims and I, therefore, address myself to the statutory issue.

STATUTORY CLAIM

20 U.S.C. § 954 (g) ¶ 2 provides:

In order to receive assistance under this subsection in any fiscal year, a State shall submit an application for such grants at such time as shall be specified by the Chairman and accompany such application with a plan which the Chairman finds —

> (A) designates or provides for the establishment of a State agency (hereinafter in this section referred to as the "State agency") as the sole agency for the administration of the State Recreation Board, or any successor designated for the purpose of this chapter by the Commissioner of the District of Columbia, shall be the "State agency";*

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*20 U.S.C. § 954 (g) (2) (A) actually reads as follows:
(A) designates or provides for the establishment of a State agency (hereinafter in this section referred to as the "State agency") as the sole agency for the administration of the State plan, except that in the case of the District of Columbia the Recreation Board, or any successor designated for the purpose of this Act by the Commissioner of the District of Columbia, shall be the "State agency";

This footnote is being added to the opinion of the District Court by counsel for the Petitioners for the purpose of clarification.

> (B) provides that funds paid to the State under this subsection will be expended solely on projects and productions approved by the State agency which carry out one or more of the objectives of subsection (c) of this section; and
>
> * * *

This subsection provides a statutory framework by which grant funds are to be disbursed to deserving applicants. Nowhere in the statute is there any indication that the State agency's determination of merit is to be final and binding. Instead, the procedure requires that the Commission initially sift through the numerous applications determining which ones are artistically meritorious and, therefore, deserving statutory aid. It is essential for any applicant to first receive the Commission's approval before it can obtain grant funds.

It is important to note that, in section 954 (g) (2) (A) , Congress mandated that the State art agency is to be "the sole agency for the administration of the State plan." In subparagraph (B), which relates to the disbursement of funds, Congress deleted the requirement that the State art agency be the "sole" determining body.

In conjunction with this observation, it is important to note that New Hampshire law requires the Governor and Council to approve all appropriations[1] made by State agencies. NH RSA 4:15. In addition, New Hampshire Const. Pt. 2, Art. 56, provides:

> No monies shall be issued out of the treasury of this state, and disposed of, . . . but by warrant under the hand of the governor for the time being by and with the advice and consent of the council for the necessary support and defense of this state, ...

---

[1]I note that the question of whether the 954(g) funds remain federal funds while they are in the State treasury was not raised by the parties, and I do not believe it to be determinative of the issue presented.

I hold that, under New Hampshire law, section 954 (g) funds may be expended only on those projects which have received the initial approval of the Commission and the subsequent approval of the Governor and Council. While the defendants are not "widely known for their professional competence and experience in connection with the performing and fine arts," NH RSA 19-A:2, they still have the discretionary power to refuse to disburse funds to a project because they do not find it to be artistically deserving.

Defendants' motion to dismiss is granted.

SO ORDERED.

/s/ Hugh H. Bownes
United States District Judge

July 18, 1975

cc: Howard B. Myers, Esq.
Edward A. Haffer, Esq.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW HAMPSHIRE

Advocates for the Arts, *et al.*,

v.

Meldrim Thomson, Jr.
Governor of the State of New Hampshire, *et al.*,

Civil Action File No. 75-97
JUDGMENT

This action came on for (hearing) before the Court, Honorable Hugh H. Bownes, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged judgment in accordance with Memorandum Opinion rendered July 18, 1975.

Defendants' motion to dismiss is granted.

Dated at Concord, New Hampshire, this 18th day of July, 1975.

Mary Louise Couture
Deputy Clerk of Court

CC: Howard B. Myers, Esq.
Edward A. Haffer, Esq.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW HAMPSHIRE

Advocates for the Arts; Granite Publications Incorporated; Rosellen Brown; Douglas K. Morse; and Vera Vance,

Plaintiffs

v.

Meldrim Thomson, Jr., Governor of the State of New Hampshire; James Hayes, Executive Councilor of the State of New Hampshire; Lyle Hersom, Executive Councilor of the State of New Hampshire; Bernard Streeter, Executive Councilor of the State of New Hampshire; Leon Yeaton, Executive Councilor of the State of New Hampshire; and Louis D'Allesandro, Executive Councilor of the State of New Hampshire.

Defendants

Civil No. C 75-97

MOTION TO CORRECT STATEMENT
IN MEMORANDUM OPINION

Now come plaintiffs in the above-captioned action by their attorney Howard B. Myers and move this Court for an order modifying page six of its Memorandum Opinion and specifically the following sentence: "Indeed, counsel admitted that, if the Commission had denied plaintiffs' application on the ground that Granite Magazine contained obscene matter, this action would not raise any constitutional questions."

The basis for this motion is that:

1. Plaintiffs' attorney does not recall making that specific statement and that if he did, he did not mean to imply that the Commission could deny the application solely because it was obscene.

2. The characterization of plaintiffs' attorney's statement is contrary to the position of the plaintiffs and may prejudice an appeal should plaintiffs' determine to appeal the Court's decision.

Respectfully submitted,
Advocates for the Arts;
Granite Publications Incorporated;
Rosellen Brown; Douglas K. Morse;
and Vera Vance

By
Howard B. Myers
Dated: 24 July 1975

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW HAMPSHIRE

Advocates for the Arts, *et al.*,

v.

Meldrim Thomson, Jr.
Governor of the State of New Hampshire, *et al.*,

Civil Action No. 75-97

ORDER

The plaintiffs' motion to correct statement in Memorandum Opinion is granted. While my recollection is that counsel made either the admission as stated in the opinion or one so close to it that there is no significant difference, I have to admit that my recollection may be faulty. I do not wish to in any way impede plaintiffs' posture on appeal. The sentence on page 6 is, therefore, modified to read as follows:

> Indeed, it is clear that, if the Commission had denied plaintiffs' application on the ground that Granite Magazine contained obscene matter, this action would not raise any constitutional questions.

SO ORDERED.

/s/ Hugh H. Bownes
United States District Judge

July 25, 1975

cc: Howard B. Myers, Esq.
Edward A. Haffer, Esq.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1862

ADVOCATES FOR THE ARTS; GRANITE PUBLICATIONS, INCORPORATED; ROSELLEN BROWN; DOUGLAS K. MORSE; AND VERA VANCE

Petitioners

v.

MELDRIM THOMSON JR., GOVERNOR OF NEW HAMPSHIRE; JAMES HAYES, LYLE HERSOM, BERNARD STREETER, LEON YEATON, AND LOUIS D'ALLESANDRO, COUNCILORS OF NEW HAMPSHIRE

Respondents

BRIEF IN OPPOSITION TO CERTIORARI

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State House Annex
Concord, New Hampshire 03301

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JURISDICTION

Petitioners have met the time requirements of 28 U.S.C. §2101(c) and have adequately invoked 28 U.S.C. §1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutes involved are 20 U.S.C. §§951 et seq., N. H. Rev. Stats. Ann. ch. 19-A, and N.H. Rev. Stats. Ann. 4:15 and 21:31-a. Involved also are the First and Fourteenth Amendments of the United States Constitution and Part 2 Articles 41, 56, 60, and 62 of the New Hampshire Constitution. The critical terms of the state statutes and of the state constitution are set out in the Appendix hereto. Petitioners' petition sets out the First and Fourteenth Amendments.

QUESTION PRESENTED

Did petitioners have a First Amendment claim to money from a discretionary state art-grant program, administered by the New Hampshire Governor and Council?

STATEMENT OF THE CASE[1]

On 15 April 1975, petitioners, individuals and nonprofit organizations, filed suit in federal district court to have the New Hampshire Governor and Council enjoined from exercising their discretion in approving grants under a state art-grant program. On motion by the Governor and Council, the district

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[1]References are made to the appendix (A.) before the court of appeals. By letter dated 23 June 1976, petitioners' counsel indicated to the Clerk of the Supreme Court that nine copies of the appendix below were being filed with the Supreme Court.

court dismissed the complaint on 18 July 1975. Petitioners appealed, and on 31 March 1976 the court of appeals affirmed the judgment below.

In 1965, Congress established the National Endowment for the Arts, which provides for, among other things, (1) direct grants from the federal government to persons engaged in art projects and productions, and (2) grants-in-aid to states in order to assist them in their support of persons engaged in art projects and productions. 20 U.S.C. §954. For a state to receive these grants-in-aid, it must have a state agency to administer the grant program. *Id.* In New Hampshire, that agency is the New Hampshire Commission on the Arts (Commission), which was established in 1965 and operates under N.H. Rev. Stats. Ann. ch. 19-A. Before 5 July 1975, N.H. Rev. Stats. Ann. ch. 19-A was silent on whether decisions by the Commission to grant money were subject to the approval of the State's chief executive body, the Governor and Council. However, by force of (1) N.H. Rev. Stats. Ann. 4:15, a statute of general applicability concerning agency expenditures, and (2) N.H. Const. Pt. 2 Art. 56, concerning disbursements from the State treasury, that approval was necessary. As of 5 July 1975, moreover, a third law—addressed specifically to the Commission—also requires that result: N.H. Rev. Stats. Ann. 19-A:6, as amended by 1975 N.H. Laws 128.

The administrative practice has followed the law. Since the Commission's creation in 1965, the unvaried practice has been that all Commission grants of more than $500 are subject to the Governor's and Council's prior approval. (A. 18.)

Granite is a journal of prose and poetry that is edited, printed, and published by Granite Publications, Incorporated (Granite), a New Hampshire nonprofit corporation. (A. 2.) In July 1972, acting on a request by Granite, the Commission voted to award it $950 to assist in the publication of *Granite*. (A. 5.) In accordance with N.H. Rev. Stats. Ann. 4:15 and N.H. Const. Pt. 2 Art. 56, and consistently with the precedent concerning Commission disbursements (see A. 18), the State's Governor and Council passed upon the Commission's decision. They approved it, and thus authorized the grant. (A. 5.) Late in 1973, Granite applied to the Commission for a second grant, this one for $1,000. (A. 6.) The Commission, though, voted to award Granite only $750. The Governor and Council then approved that decision at a session of their meeting of 1 May 1974. Immediately after that session was adjourned, however, the Governor and Council were shown a piece of writing entitled "Castrating the Cat," which had appeared in *Northern Lights*, a special edition of *Granite* at the end of 1972. "Castrating the Cat" goes as follows:

CASTRATING THE CAT

—It is better to marry than to burn —

St. Paul

you may keep both balls preserved in a jar
on the mantle piece

he will be tamer more loving
to his keepers

he will not stray after cat cunt
and his urine will not smell
should he spray the mattress

—a simple swipe of scalpel
along the scrotum
and it is done —

do not let the image of your own hulk
drawn down a bannister of razor blades
finger the inside of your sac

think of him as a tenor in the choir

—and it is done
the nurse washes her hands of him
yes she smiles we clipped his wings—

as above the errors flesh is heir to
like St. Simeon on his desert pole
unwashed in rags
who picked up each worm that fell
from his arm bid it eat and put it back

The Governor and Council read this writing and had, in petitioners' words, an "adverse reaction to it." (A. 6.) They then reconvened their meeting and rescinded their grant-approval. (A. 6.) They made absolutely no attempt or threat, however, to interfere in any way with any publication of Granite's.

Eleven and a half months later, on 15 April 1975, Granite brought this action. In the meantime, it had published at least four numbers of *Granite* (A. 17) and had sought financial assistance directly from the federal government. (A. 20-21; see also p. 17 of Granite's memorandum at the district court.) In its complaint, Granite said that the court had jurisdiction under 28 U.S.C. §1331, 28 U.S.C. §1343(3), and 42 U.S.C. §1983. (A. 2 and 8.) It said that the Governor's and Council's decision of nearly a year before was in violation of 20 U.S.C.§§951 et seq., N.H. Rev. Stats. Ann. ch. 19-A, and the First and Fourteenth Amendments. (A.5-10.) Granite did not specifically request damages, but sought preliminary and permanent injunctions restraining the Governor and Council: "from . . . interfering with the First and Fourteenth Amendment rights of any grantee . . .[of] the Commission" (A.8); "from making any determination regarding the literary or artistic merits of any project or grantee, which determination would have the effect of denying any grant awarded by the . . .Commission" (A.8); and "from exercising any discretion with respect to the artistic or literary merits or qualifications of any applicant or grantee of funds administered by the . . .Commission" (A.10). Joining Granite as petitioners were: Advocates for the Arts (Advocates), a non-profit organization whose principal place of business is New York City and whose purpose is "to form a national constituency of individuals concerned with the promotion of the arts"; Rosellen Brown, a New Hampshire resident whose writing appeared in the Granite edition that contained "Castrating the Cat"; Douglas K. Morse, a New Hampshire resident who is a member of Advocates; and Vera Vance, a New Hampshire resident whose writing appeared in the Granite edition that contained "Castrating the Cat," and who is a member of Advocates and has subscribed to *Granite*. (A. 2-3.)

The Governor and Council, asserting that the district court lacked subject-matter jurisdiction and that petitioners had

failed to state a claim on which relief could be granted, moved for dismissal.[2] (A.13.) As was indicated above, judgment was entered for the Governor and Council on 18 July 1975 and affirmed on 31 March 1976. At the court of appeals petitioners expressly waived their statutory arguments. (Petitioners' brief at court of appeals, pp. 4 and 8-16.)

ARGUMENT OPPOSING CERTIORARI[3]

I.

The Decision Does Not Conflict With Decisions Of Other Courts of Appeals.

As far as respondents can determine, this is the only court-of-appeals decision of its kind.

II.

There Is No Important Question Of Federal Law That Should Be Settled By This Court.

Freedom of speech is not even remotely in jeopardy here. Whether the magazine that published "Castrating the Cat" deserved a $750 public art subsidy more than did any of its competitors is simply not an important question of federal law.

> [P]ublic funding of the arts seeks "not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge" artistic expression. *Buckley* v. *Valeo*, . . .[44 L.W. 4127] at 4154 [U.S.S.C. 30 Jan. 1976]. A disappointed grant applicant cannot complain that his work has been suppressed, but only that another's has been promoted in its stead. [*Advocates for the Arts* v. *Thomson*, 532 F.2d 792,795 (1st Cir. 1976).]

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[2]The Governor and Council asked the district court that, should it find it necessary to rely on matters asserted in the affidavits, the court then treat the motion to dismiss as a motion for summary judgment. (A.16.)

[3]Below respondents made preliminary arguments on jurisdiction, standing, and equitable relief. For purposes of brevity, respondents do not assert those arguments here, but reserve the right to assert them in a brief on the merits, should the Court grant certiorari.

But even if the normal meaning of "suppressed" were set aside and it were assumed, arguendo, that Granite could complain that its work had somehow been "suppressed," its complaint would still not state a redressable injury. For the speech in issue would be of a kind that cannot invoke the fullest measure of First Amendment protection. See, e.g., *Young* v. *American Mini Theatres*, 44 L.W. 4999 (U.S.S.C. 24 June 1976); *Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 44 L.W. 4686 (U.S.S.C. 24 May 1976) (NB n. 24 at 4693); *Close* v. *Lederle*, 424 F.2d 988, 989 (1st Cir. 1970) cert. denied 400 U.S. 903 (1970). Cf. *Hynes* v. *Mayor and Council*, 44 L.W. 4643 (U.S.S.C. 19 May 1976) (NB Brennan, J., dissenting at n. 3 and accompanying text at 4648-49).

Although in its anatomical implications the comparison might be imperfect, this Court could say about "Castrating the Cat," and Granite's poetry generally, what it has already said about "erotic materials": "[E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate that inspired Voltaire's immortal comment [on defense of speech]." *Young*, *supra* at 5005.

In the instant case we have not only lesser-protected speech, but lesser-protected speech that has not even been suppressed. Petitioners' First Amendment argument, therefore, is as impotent as their celebrated cat.

III.

The Decision Is Correct And Does Not Conflict With Applicable Decisions Of This Court.

In *Freedman* v. *Maryland*, 380 U.S. 51 (1965), Mr. Justice Douglas said in his concurring opinion, "I do not believe that any form of censorship . . . is permissible." *Id.* at 61-62. The same champion of freedom of expression, however, also recognized that the First Amendment does not force subsidies for expression. He spoke to this point in his concurring opinion in *Cammarano* v. *United States*, 358 U.S. 498 (1959), in which the Supreme Court unanimously rejected a First Amendment challenge to the denial of a tax deduction that had been claimed for

costs of political advertising. Mr. Justice Douglas said at 515:

> To hold that this item of expense must be allowed as a deduction would be to give impetus to the view favored in some quarters that First Amendment rights are somehow not fully realized unless they are subsidized by the State. Such a notion runs counter to our decisions . . ., and may indeed conflict with the underlying premise that a complete hands off policy on the part of government is at times the only course consistent with First Amendment rights.

Cf. *P.A.M. News Corporation* v. *Butz*, 514 F.2d 272 (D.C. Cir. 1975).

Petitioners rely on *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975), where the Court held that Chattanooga municipal officials had improperly denied the producers of "Hair" the use of a municipal theatre. For three reasons the reliance is misplaced. First, petitioners lump together what logic would keep separate: speaking and money. In the simplest possible terms, *Southeastern* is a speaking case whereas *Advocates* is a money case. Granted, this may be an oversimplification (see *Buckley*, *supra*); yet it serves to illuminate a difference that petitioners would obscure.

In *Southeastern*, the complained-of injury was not economic. The "Hair" producers were not seeking the cushion of a public subsidy. They were seeking the use of a public forum. Contrast the case at bar: no public forum was sought by, or denied to, Granite; nor was Granite denied access to the public through the medium of print. The State has left Granite alone to speak and write what it wants. And, more—by keeping copies of Granite's publications at the State Library (A.17)—the State has actually helped Granite communicate its ideas to the public. All that has been denied to Granite is public money. But a denial of public money—as distinguished from a restriction on certain expenditures of private money—simply does not trench on one's freedom to speak. See *Buckley*, *supra*.

The second reason that *Southeastern* is inapposite is that it evidently did not involve any competition for the use of the public forum. 420 U.S. at 555. For the receipt of New Hampshire art grants, however, there emphatically is competition. It is a case of too many persons—to say nothing of cats—chasing too few dollars. The very nature of the art-grant program calls for the Governor and Council to choose among competitors.

Here the Governor and Council did their job: they chose. And Granite lost. That result, however, neither violates the First Amendment nor requires the attention of the nation's highest court.

Third, the remedy called for in *Southeastern* tells just how radically different the problem there was from the problem here. The Court said in *Southeastern*:

> "...[B]ecause only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." [*Freedman* v. *Maryland*,] 380 U.S. [51] at 58. We held in Freedman, and we reaffirm here, that a system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards: *First*, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. *Second*, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. *Third*, a prompt final judicial determination must be assured. [420 U.S. at 559-60.]

If applied here, the *Southeastern* remedy would: (1) give the judiciary the executive function of granting and denying art awards; (2) require the executive to take to court every application for an art award; (3) require the executive to prove that the material in question is "unprotected," even though he might concede that it is "protected," but nevertheless bad art; (4) arguably require the executive to make a conditional grant pending resolution of the matter in court; and (5) clot court dockets with art-grant problems, whose subject matter might range from castrated cats to fertile ferns. The absurdity of this conclusion says much about its premise: *Advocates*, unlike *Southeastern*, is not a case of prior restraint.

Petitioners also rely on *Perry* v. *Sinderman*, 408 U.S. 593 (1972), where a government employer disapproved of expressions by a government employee, and thereupon denied him renewal of his employment contract—denied him a government "benefit." This Court held that the employer's action violated the First Amendment. But in *Perry* the expressions disapproved of had nothing to do with the employee's qualifications for the desired job; i.e., the expressions were *not intrinsic* to the benefit sought. And it is on this point that the case at bar differs. In a discretionary art-grant program, the grant-applicant's expressions within the object for which it seeks a grant have *everything* to do with its qualifications for the grant; its expressions there *are intrinsic* to the benefit sought. The very essence of a discretionary art-grant program is to reward some expressions and to withhold rewards from others; it requires judgments to be made on expressions. And the only fair determinant for whether an award should be granted is how the applicant has expressed itself within the object for which it seeks an award. That was the determinant in the case at bar. And the result did nothing more than illustrate the converse of Mr. Justice Harlan's proposition in *Cohen* v. *California*, 403 U.S. 15, 25 (1971): often, one man's lyric is another's vulgarity.

This Court has denied certiorari in cases somewhat analogous to *Advocates*. In *Presidents Council, District 25* v. *Community School Board No. 25*, 457 F.2d 289 (2d Cir. 1972) cert. denied 409 U.S. 998 (1972), the defendant school board removed a book (*Down These Mean Streets* by Piri Thomas) from the libraries of all junior high schools in the public school district. The plaintiff—an organization of junior high school students in the district, parents of such students, and officials of parent-teacher associations in the district—claimed a violation of the First Amendment, and sued for declaratory and injunctive relief. Affirming the dismissal below, the court of appeals said at 291-92:

> Since we are dealing not with the collection of a public book store but with the library of a junior high school, evidently some authorized person or body has to make a determination as to what the library collection will be. It is predictable that no matter what choice of books may be made by whatever segment of academe, some other person or group may well dissent. The ensuing shouts of book burning, witch hunting and violation of academic freedom hardly elevate this intramural strife to first amendment constitutional proportions. If it did, there would be a constant intrusion of the judiciary into the internal affairs of the school. Academic freedom is scarcely fostered by the intrusion of three or even nine federal jurists making curriculum or library choices for the community of scholars ....

And at 293, the court said:

> The administration of any library . . . involves a constant process of selection and winnowing based not only on educational needs but financial and architectural realities. To suggest that the shelving or unshelving of books presents a constitutional issue, particularly where there is no showing of a curtailment of freedom of speech or thought, is a proposition we cannot accept.

See also *Minarcini* v. *Strongville City School District*, 384 F. Supp. 698 (N.D. Ohio 1974). If the school board's book-removing in *Presidents Council* did not violate the First Amendment, then a fortiori the Governor's and Council's denial of an art award here did not violate the First Amendment. The Governor and Council merely denied Granite a gratuity; they did not deny Granite's magazine a place in a publicly supported library; or, said in a way that implicates the First Amendment, they did not deny the magazine a place in a public "reading forum." Indeed, as has already been indicated, *Granite* remains in the New Hampshire State Library. (A. 17.)

In *Avins* v. *Rutgers, State University of New Jersey*, 385 F.2d 151 (3d Cir. 1967) cert. denied 390 U.S. 920 (1968), the editors of the law review of a state-supported university refused to publish an article by the plaintiff. The plaintiff, invoking the First Amendment, sued for declaratory and injunctive relief. Affirming the district court's summary judgment against the plaintiff, the court of appeals said at 153-54:

> . . . [No] one doubts that . . . [the plaintiff] may freely at his own expense print his article and distribute it to all who wish to read it. However, he did not have the right, constitutional or otherwise, to commandeer the press and columns of the Rutgers Law Review for the publication of his article, at the expense of the subscribers to the Review and the New Jersey taxpayers, to the exclusion of other articles deemed by the editors to be more suitable for publication. On the contrary, the acceptance or rejection of articles submitted for publication in a law school law review necessarily involves the exercise of editorial judgment and this is in no wise lessened by the fact that the law review is supported, at least in part, by the State.
>
> The plaintiff's contention that the student editors of the Rutgers Law Review have been so indoctrinated in a liberal ideology by the faculty of the law school as to be unable to evaluate his article objectively is so frivolous as to require no discussion.

The Governor and Council in the instant case are the analogue of the law review editors in *Avins*: just as the editors had, and have, lawful authority to judge what is "suitable for publication" in the law review, so too the Governor and Council had, and have, lawful authority to judge what is suitable for subsidization under the art-grant program; and just as the editors' judgment did not infringe Mr. Avins's First Amendment rights, so too the Governor's and Council's judgment did not infringe Granite's.

In *Associated Students of Western Kentucky University* v. *Downing*, 475 F.2d 1132 (6th Cir. 1973) cert. denied 414 U.S. 873 (1973), the defendant university president and board of regents cancelled a filmbooking contract, under which a movie involving nudity was to have been shown on campus. The contract had been entered into earlier as part of a cultural program financed under the university budget. Claiming that the cancellation violated the constitutional rights of its members, the plaintiff student organization sued for declaratory and injunctive relief. It was denied relief at both the district court and the court of appeals. The Sixth Circuit concluded, "In the present case the University did nothing more than to make a determination that, with respect to a particular experimental film, it would be 'inappropriate for the University to continue as a contracting party.' " 475 F.2d at 1134. Nothing the Governor and Council did in the instant case is any more extreme.

CONCLUSION

For the foregoing reasons, the Court should deny certiorari.

Respectfully submitted,

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21 July 1976

APPENDIX

Before 5 July 1975, N.H. Rev. Stats. Ann. 19-A:6 provided as follows:

> Powers. The commission is hereby authorized and empowered to hold public or private hearings; to accept gifts, contributions and bequests of unrestricted funds from individuals, foundations, corporations and other organizations or institutions for the purpose of furthering the educational objectives of the commission's programs; to make and sign any agreements and to do and perform any acts that may be necessary, desirable or proper to carry out the purposes of this act. The commission may request and shall receive from any department, division, board, bureau, commission or other agency of the state such assistance and data as will enable it properly to carry out its powers and duties hereunder.

As of 5 July 1975, N.H. Rev. Stats. Ann. 19-A:6 was amended, by 1975 Laws 128:1, to provide as follows:

Powers. The commission is hereby authorized and empowered to:

I. Hold public or private hearings;

II. Accept gifts, contributions and bequests of unrestricted funds from individuals, foundations, corporations and other organizations or institutions for the purpose of furthering the educational objectives of the commission's programs;

III. Make and sign any agreements and to do and perform any acts that may be necessary, desirable or proper to carry out the purposes of this chapter;

IV. Request and shall receive from any department, division, board, bureau, commission or other agency of the state such assistance and data as will enable it properly to carry out its powers and duties hereunder;

V. *Receive funds provided by the National Endowment for the Arts under the National Foundation on the Arts and the Humanities Act of 1965*, and under such additional federal legislation and state appropriations as may be enacted;

VI. *Allocate and disburse said funds by entering into*

contracts and agreements with any department, agency or subdivision of federal, state, county or municipal government or *any individual, foundation, corporation, association or public authority in order to carry out the purposes of this chapter, subject to approval by the governor and council*;

VII. Employ such persons in accordance with the rules of the department of personnel as may be necessary within the commission's appropriation, to enable and assist it to perform the duties, exercise the powers and make the reports required by this chapter. [Emphasis added.]

N.H. Rev. Stats. Ann. 4:15 provides in relevant part:

> Department Expenditures. The expenditure of any moneys appropriated or otherwise provided to carry on the work of any department of the state government shall be subject to the approval of the governor, with the advice of the council, under such general regulations as the governor and council may prescribe with reference to all or any of such departments, for the purpose of securing the prudent and economical expenditures of the moneys appropriated . . . .

The Commission derives money from the State's general fund and from the federal government. The federally derived funds are, of course, appropriated by Congress. But they are "appropriated" a second time by the New Hampshire Legislature. The Legislature acts as a budgetary conduit for the funds between the federal government and the state agency; and it uses the verb "appropriate" to describe how it treats those funds. See, e.g., 1973 N.H. Laws 376:49.

N.H. Rev. Stats. Ann. 21:31-a provides as follows:

> Governor and Council. The phrase "governor and council" shall mean the governor with the advice and consent of the council.

N.H. Const. Pt. 2 Art. 41 provides as follows:

> [Governor; Supreme Executive Magistrate.] There shall be a supreme executive magistrate, who shall be styled the Governor of the State of New Hampshire, and

whose title shall be His Excellency. The executive power of the state is vested in the governor. The governor shall be responsible for the faithful execution of the laws. He may, by appropriate court action or proceeding brought in the name of the state, enforce compliance with any constitutional or legislative mandate, or restrain violation of any constitutional or legislative power, duty, or right, by any officer, department or agency of the state. This authority shall not be construed to authorize any action or proceedings against the legislative or judicial branches.

N.H. Const. Pt. 2 Art. 56 provides as follows:

[Disbursements from Treasury.] No moneys shall be issued out of the treasury of this state, and disposed of, (except such sums as may be appropriated for the redemption of bills of credit, or treasurer's notes, or for the payment of interest arising thereon) but by warrant under the hand of the governor for the time being, by and with the advice and consent of the council, for the necessary support and defense of this state, and for the necessary protection and preservation of the inhabitants thereof, agreeably to the acts and resolves of the general court.

N.H. Const. Pt. 2 Art. 60 provides as follows:

[Councilors; Mode of Election, etc.] There shall be biennially elected, by ballot, five councilors, for advising the governor in the executive part of government. The freeholders and other inhabitants in each county, qualified to vote for senators, shall some time in the month of November, give in their votes for one councilor; which votes shall be received, sorted, counted, certified, and returned to the secretary's office, in the same manner as the votes for senators, to be by the secretary laid before the senate and house of representatives on the first Wednesday of January.

N.H. Const. Pt. 2 Art. 62 provides as follows:

[Subsequent Vacancies; Governor to Convene; Duties.] If any person thus chosen a councilor, shall be elected governor or member of either branch of the legisla-

ture, and shall accept the trust; or if any person elected a councilor, shall refuse to accept the office, or in case of the death, resignation, or removal of any councilor out of the state, the governor may issue a precept for the election of a new councilor in that county where such vacancy shall happen and the choice shall be in the same manner as before directed. And the governor shall have full power and authority to convene the council, from time to time, at his discretion; and, with them, or the majority of them, may and shall, from time to time hold a council, for ordering and directing the affairs of the state, according to the laws of the land.